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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

v.

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 1168

THE FLYING TIGER LINE, INC.,

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v.

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

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Questions Presented

1. Is the United States District Court for the Southern District Court of New York a proper forum for this case within the contemplation of Article 28 of the Warsaw Convention?

2. Was the delivery of the airline ticket to the respondents' decedent, Frederic Thorn Mertens, improper within the meaning of Article 3 (2) of the Warsaw Convention so as to render Article 22 of the Convention inapplicable insofar as it limits the recovery of damages?

Statement

Respondent accepts petitioner's Statement (P. pp. 3 to 6) except as hereinafter modified.

The delivery of the airline ticket by an employee of petitioner was made after respondents' decedent boarded the plane, and immediately prior to flight so that no opportunity was afforded to respondents' decedent to read the provisions regarding limitation of liability printed on the reverse side of the ticket and act upon the knowledge thereby conveyed to him. Respondents' decedent was denied a reasonable opportunity to either enter into a special contract with petitioner providing for additional liability protection or secure other flight insurance protection. Delivery of the ticket was made only after the passenger door on the airplane was closed, and only a ladder at the pilot's door was a possible means of egress (C. A. appellants' brief and appendix p. 12).

Article 28 of the Warsaw Convention provides that an action for damages in the case of injury or death to a passenger must be brought in a court of one of the High Contracting Parties. In addition, the High Contracting Party must have one of the four enumerated contacts set forth in the article, to wit, the nation must be the domicile of the carrier, his principal place of business, where he has a place of business through which the contract of transportation was made or the place of destination specified for the flight.

This action was commenced on May 13, 1959, and petitioner answered the complaint on May 28, 1959. It was not until March 26, 1963, almost four years later, that petitioner moved the District Court to dismiss the complaint on the basis of improper forum. Mr. Justice Wyatt in his opinion order dismissed the motion stating "The motion as made under Rule 12(b) is obviously out of time and therefore cannot be considered under that provision of the Rules. No motion under Rule 12(b) was made by defendant be-

fore pleading and no defense of lack of jurisdiction over the subject matter was asserted in the answer, filed May 29, 1959. See Fed. R. Civ. P. 12(b) and (d)". Appendix B, p. 30a. No argument regarding personal jurisdiction or venue can now be properly raised.

Argument

Petitioner seeks review of a non-final order of the Court of Appeals for the Second Circuit. Circuit Judge Marshall remanded the action to the Southern District for New York for "a new trial on the issue of damages" (Appendix B, p. 20a). It is the general rule that the writ will be refused where there has been no final determination, and the proceedings in the lower tribunal are still pending.* No exceptional circumstances or probable irreparable injury has been shown by petitioner to remove the instant case from this prohibition.

The decision below is in accord with like decisions of the Court of Appeals for the Second Circuit. It does not conflict with the recent decisions of any other court of appeals, and is a correct application of the governing principles of law. Further review is unnecessary.

(1) *Choice of Forum.* Petitioner's argument that the law is unsettled regarding the effect of Article 28 of the Warsaw Convention as it applies to subject matter jurisdiction in United States District Courts evidences a failure to

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* *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U. S. 372 (1893);
Simkins v. *Simkins*, 271 F. 87 (CCA 5th Circuit, 1921);
Carville v. *Allen*, 214 N.Y.S. 2d 985, 13 A. D. 2d 866 (3rd Dept., 1961);
General Mut. Ins. Co. v. *Mutual Ins. Rating Bureau*, 264 N.Y.S. 2d 679, 23 Misc. 2d 991 (1960);
Public Porters Protective and Defense Ass'n of New York Inc. v. *O'Connell*, 168 N.Y.S. 2d 350, 8 Misc. 2d 1001 (1957);
Santa Clara Lumber Co. v. *Comm. of Land Office*, 204 N.Y.S. 746, 209 App. Div. 705 (3rd Dept. 1924).

properly construe the issue that was resolved in the Court below, and the settled state of the law today between the circuits on that issue.

Petitioner attempts to sustain his fallacious interpretation of Article 28 regarding the use of the term "place" by alleging that the same use of the term was made in Article 1, Paragraph (2). This is purely conclusory, and unsupported either by case law or statutory authority. In addition, "the plain meaning" of Article 1 as compared to Article 28 indicates a different use of the term "place" in Article 1 as opposed to Article 28. Article 1 uses the term in the following context:

> "(2) For the purposes of this Convention the expression 'international transportation' shall mean any transportation in which, . . . the place of departure and the place of destination . . . are situated either *within* (emphasis supplied) the territories of the two High Contracting Parties or *within* (emphasis supplied) the territory of a single High Contracting Party if there is an agreed stopping place *within* (emphasis supplied) a territory subject to the sovereignty . . . of another power, . . ." (Appendix A, pp. 3a, 4a)

The term "place", then, in Article 1 refers to a location within the territorial boundaries of one of the High Contracting Parties. If this was the intention of the drafters with reference to Article 28, as petitioner alleges, then instead of Article 28 reading:

> "(1) An action for damages must be brought . . . in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." (Appendix A, p. 5a)

it would have been drafted so as to read in part:

> "Of his principal place of business, *within the territory of a single High Contracting Party*, or where he has a place of business *within the territory of a single High Contracting Party* . . . or before the court at the place of destination *within the territory of the single High Contracting Party.*"

It is apparent, then, that petitioner's argument from analogy must fail.

The Second Circuit Court below expressly addressing itself to this issue stated:

> "Plaintiff's choice of forum within that country is governed by the internal law, with all its intricacies and complexities, not by the Warsaw Convention . . . The basic unit of international law is the nation-state and it is fair to assume, absent clear indications to the contrary, that Article 28 (1), was written with reference to nation-states, not to areas and subdivisions of nation-states." (Appendix B, p. 12a)

It is an accepted principle that the latest decision in a given circuit is deemed to be the accepted law of that circuit.

Petitioner relies upon the lower court authorities cited, and overruled by Circuit Judge Marshall (Appendix B, p. 11a, ft. nt. 1), save for the addition of one decision, *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Av. R. 651 (N. D. Ill. 1961).

The Northern District of Illinois is now in accord with the position of the Southern District of New York, as reflected by the opinion below, since *Pardonnet* v. *The Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N. D. Ill. 1964), was decided overruling *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Ar. R. 651 (N. D. Ill. 1961), as is the Eastern District of Pennsylvania since *Pitman* v. *Pan American World Airways, Inc.*, 223 F. Supp. 887 (E. D. Pa. 1963),

overruled *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E. D. Pa. 1962).

In addition, the United States Supreme Court is not concerned with conflicts between district courts but rather conflicts between circuits and petitioner makes no showing of any present conflict of authority between circuits on this question. Finally, the United States Supreme Court is not primarily concerned about conflicts within a circuit and that fact notwithstanding there is no present conflict shown by petitioner within any Circuit Courts of Appeal.

Petitioner alleges that there are "... conflicting decisions as to whether Article 28 refers to subject matter jurisdiction or merely to venue" (P. p. 8). Petitioner further states "The Court below expressly declined to pass on the question of whether Article 28 relates to subject matter jurisdiction or merely to venue" (P. p. 9), but fails to state the obvious reason why the Court declined to make such a determination, to wit, no determination of that issue was necessary for a full and complete judicial finding. All that had to be decided was whether Article 28 referred to the nation-state unit, or to particular locations within a given nation-state (as one of the four enumerated "places").

Petitioner does not cite a single Circuit Court decision conflicting with the ruling of the Circuit Court in this case. As to the District Court and state court cases relied upon by petitioner Circuit Judge Marshall considered and disposed of them by his comment "none of which we find persuasive" (Appendix B, p. 112, ft. nt. 1).

Petitioner has obviously failed to make the necessary distinction between the use of the terms subject matter jurisdiction, and venue as used in this country and by the drafters of the Warsaw Convention. *Pardonnet* v. *The*

Flying Tiger Line, Inc., supra, drew the necessary distinction in the following language appearing on pages 686 and 687:

> ". . . it seems doubtful that the drafters of the Warsaw Convention, almost all of whom were from civil law, not common law, countries, and only a small number of whom were from countries which have a federal court system similar to that in the United States, would be concerned at all with the internal operations of the judicial system of any particular nation. Thus, it seems the better construction of Article 28 (1) of the Warsaw Convention to read each of the four situs mentioned as referring only to the nation in which the suit may be brought but not to a particular court within a nation . . .
>
> Further support of this 'national' interpretation of Article 28 of the Convention is found in subsection (2) of that Article, which states that: 'Questions of procedure shall be governed by the law of the court to which the case is submitted[;] . . . questions of procedure, such as . . . where within the territory of one of the high contracting parties the court in which the suit is filed should be located . . .'"

Spencer v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S.D.N.Y. 1962), indicates the obvious fallacy of petitioner's reliance upon Article 32 of the Convention reference to jurisdiction. At page 506, the Court stated:

> "For the use of the term 'jurisdiction' in an international convention drawn by representatives of nations with widely divergent systems of jurisprudence can scarcely be construed to refer to the concept of subject matter jurisdiction *as used in the federal judical system of the United States.*" (emphasis supplied)

The Court further stated at page 507:

> "It is unnecessary here to decide . . . the question of whether or not venue was properly laid in this district; . . . defendant by serving its answer has waived its right to object to venue or to move for transfer on the ground of improper venue under 28 U.S.C. § 1406."

As already indicated, that is the precise situation in the instant case.

In *Khan* v. *Compagnie Nationale Air France,* 9 CCH Avi. 17,107 (S.D.N.Y. 1964), the Court stated that:

> ". . . Article 28 cannot dictate where, within the territory of one of the parties, suit must be brought . . ." (p. 17,107)

Rotterdamsche Bank v. *British Overseas Airways Corp.,* 1953 U. S. Av. R. 163 (1953), 1 Lloyd's List Law Reports 154 and *Brown* v. *Compagnie Nationale Air France,* 8 CCH Avi. 17,272 (S.D.N.Y. 1962), clearly refers to jurisdiction in the same terms.

(2) *Limitation of Liability.* The petition completely misconstrues the holding of the court below insofar as it relieves respondent from the limitation of monetary liability provided for by the Warsaw Convention. Neither the arguments presented, nor the case law cited are relevant to the Circuit Court's decision in this regard. Respondent agrees with the petitioner's assertion that:

> "The application of the limitations of liability contained in the Warsaw Convention does not depend upon . . . contractual agreement . . ." (P. p. 11)

Both *Grey* v. *American Airlines, Inc.,* 95 F. Supp. 756 (S.D.N.Y. 1950), aff'd 227 F. 2d 282 (2d Cir. 1955) and the opinion below (35 F.R.D. 196 (1963)), consider the subject of limitation of liability strictly in terms of the Con-

vention. The holding below stands for the proposition that the Convention's limitation on liability is predicated upon proper delivery of the airline ticket pursuant to Article 3. *Grey* v. *American Airlines, Inc., supra,* is not opposed to that finding. It is necessary also to indicate that the *Grey* case in no way involved an interpretation of the last sentence of of Article 3 (2) which reads:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." (Appendix A, p. 52)

It is this precise provision that the Court below had to interpret in reaching its decision.

Ross v. *Pan American Airways, Inc.,* 299 N. Y. 88, 85 N. E. 2d 880 (1949), although involved with delivery of the airline ticket did not present the same issue of law as was resolved in the opinion below. In the *Ross* case the issue was one of agency, to wit, whether the passenger-plaintiff "impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out . . . [an airline] ticket in her name" (299 N. Y. at p. 96). There was no issue, then, as to whether or not the airline had fulfilled the prerequisite of adequate delivery of the ticket in advance of flight.

The unsupported comment of the petition that "The decision below, in holding that 'the ticket must be delivered to the passenger in a manner as to afford him a reasonable opportunity to protect himself against the limitation of liability' imposed by law . . . is completely at variance with the clear language of the Convention, and in conflict with *Seth, supra*" (P. p. 12) is patently spurious.

Seth v. *British Overseas Airways Corp.,* 329 F. 2d 302 (1st Cir. 1964), *cert. denied,* 13 L. Ed. 2d 61 (1964), was concerned with interpretations of entirely different arti-

cles of the Convention, to wit Article 18 (1) (2), Article 30 (3), and most particularly, Article 4 (3) (h). Plaintiff in *Seth* sought recovery for the *loss of baggage* by BOAC Airlines. Plaintiff sought to avoid the limitation as to damages relating to the loss of baggage under the Warsaw Convention. The action, however, was similar to the case at bar in that the airline ticket did not state the *amount* of the limitation of liability. The Court disposed of this issue by stating at page 307:

> "The ticket does not leave the passenger in the dark as to a hidden risk he might not appreciate. It gives him fair warning of the existence of limitations on the carrier's liability which he can avoid only on showing that the carriage undertaken by the carrier is not 'international carriage' as defined in the Warsaw Convention. This gives the passenger a blunt warning to find out the nature of his carriage and if covered by the Warsaw Convention to declare excess value and pay the price for increased liability in the event his baggage is lost. We think this constitutes compliance with sub-paragraph (h) of Article 4 of the Warsaw Convention."

If petitioner cites this case as to argue by analogy, he must then admit that the purpose of Article 4 (3) sub-paragraph (h) was to provide sufficient notice to a passenger so as to at least put him on inquiry concerning the limitations of liability. Such an inquiry would, *if delivery was timely,* afford the passenger an opportunity to obtain additional insurance if he so desired. Nothing less can be considered the purpose of Article 3 (2) relating to the requirements of notice for international transportation of persons. Admitting this, it becomes obvious that the time and circumstance of delivery of the airline ticket becomes of paramount concern, and since delivery in the instant case did not afford adequate notice, the limitation of

liability under the Convention in the case at bar is inapplicable.

It is apparent that petitioner fails to understand the distinction between being advised of the existence of a limitation of liability so as to be put on inquiry as to the extent thereof and the necessity of being informed on the ticket itself as to the exact monetary amount of the limitation. Respondent has no argument with the fact that there is nothing in the Convention which requires a precise specification as to the monetary amount of limitation to be set forth on the ticket but, once again, it must be noted that this is not the issue we are here concerned with.

Petitioner, again, misconstrues the plain meaning of the decision below when he states that it was ". . . based upon an assumption that the statement on the back of the ticket that the carriage is subject to the rules relating to liability established by the Warsaw Convention was virtually unnoticeable and unreadable" (P. p. 12). This was not in issue.

The petition continues its pursuit of not existent issues:

> "The decision below, in holding that 'the ticket must be delivered to the passenger in a manner as to afford him a reasonable opportunity to protect himself against the limitation of liability' . . . would require that the conditions be printed in a language the passenger could read, if he were literate." (P. p. 12)

Would petitioner have us deprive the vast majority of literate passengers of the opportunity to be advised that liability is limited simply because a small minority would be unable to read their ticket? Carrying this attitude of petitioner to its ultimate conclusion, one would cease the publication of any written matter because a minority are unable to read. Of course, this line of reasoning is patently absurd.

The finding of the Court below is both in accord with the uncontroverted facts and in no way at variance with the cases cited by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CLARENCE FRIED,
Attorney for Respondent.